1978

Larry N. Heath v. Sam L. Gallegos : Brief of Respondent

Utah Supreme Court

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Bean, Bean & Smedley; David E. Bean; Attorney for Plaintiff-Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

LARRY N. HEATH,	)	
	)	Case No.
Plaintiff and Respondent,	)	
	)	
vs.	)	
	)	
SAM L. GALLEGOS,	)	
	)	
Defendant and Appellant.	)	

BRIEF OF RESPONDENT

Appeal from a Judgment of the Second Judicial
for Davis County
HONORABLE J. DUFFY PALMER, Judge

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OF THE STATE OF UTAH

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	)	
Plaintiff and Respondent,	)	
	)	
vs.	)	Case No. 15569
	)	
SAM L. GALLEGOS,	)	
	)	
Defendant and Appellant.	)	

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is a rear-end collision wherein the appellant's vehicle struck the rear of respondent's vehicle on a residential street, and the main issue is whether or not the forward motorist was contributorily negligent as a matter of law.

DISPOSITION IN THE LOWER COURT

The Honorable J. Duffy Palmer, sitting without a jury, found that the collision was proximately caused by the appellant, who was the following driver, and that respondent was not negligent, and awarded damages to

respondent after dismissing appellant's counterclaim.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment rendered by the trial court.

STATEMENT OF FACTS

On the 26th day of December, 1976, a rear-end collision occurred in the westbound lane of 1750 North in the West 1600 block of Layton City, Utah (T-6). The streets were dry, and the weather sunny (T-8). Respondent stopped at the "yield" sign at 1575 West and then proceeded westbound, attaining a speed of 15 to 20 m.p.h. in a 25-mile per hour zone (T-30, L.3-5,9). Appellant says the speed was 5 to 10 m.p.h., and his wife opined the speed to be 10 to 15 m.p.h. (T-58, L.20; T-53, L.4). At the time appellant approached the accident scene he was overtaking respondent's vehicle and honked his horn to get respondent to speed up a little, because the appellant was late for church (T-58, L.24, 26). The respondent didn't know what was going on and slowed down (T-58, L.28-30; T-59, L.1). Then appellant honked again, and claims that the respondent slammed on his brakes. Respondent states he did not make a sudden

or emergency type stop, but simply made a normal stop (T-31, L.6-8). The investigating officer reported that the respondent came to a sudden stop, but under extensive cross-examination the officer admitted that he didn't know whether or not that report came to him from the respondent or the apellant (T-13, L.4-6; T-15, L.1-5). Respondent did not represent that he made a rapid stop when talking to the investigating officer, but the appellant did so represent (T-31, L.26-30 and T-32, L.1). The investigating officer further testified that at the time of the collision there were no parked cars on the right or north side of the street, and that respondent's car was stopped approximately 24 inches from the north curb, and that neither car left skid marks (T-10, L.24-29; T-7, L.8-16). At the accident scene it was the appellant who was belligerant and acting out his frustrations, and there is no evidence that the respondent was anything but cooperative (T-15, L.23). There is nothing to indicate that the respondent acted in retaliation against the appellant in the causation of this collision. The witness Dale Wanner stated that he saw the respondent slowing down and that he saw the appellant

simply run into the rear of the car in front (T-18, L.27, et seq.). Appellant first testified that he had no recollection of any cars parked on 1750 North in the area of the collision (T-4, L.17-26). Through the progress of the trial, it became apparent that such testimony was not in appellant's best interest, and his memory improved substantially so that by the end of the trial he testified that there were cars on the side of the road, but he didn't say which side (T-58, L.28). Nevertheless, appellant's wife testified that there was room to pass on the left side after the collision occurred (T-54, L.27), and appellant's son testified that there were no oncoming cars (T-58, L.1,2).

POINT I

THE JUDGMENT OF THE TRIAL COURT IS SUPPORTED BY A PREPONDERANCE OF THE BELIEVABLE EVIDENCE.

Where there is conflicting evidence on any issue, it is assumed that the trial court believed those aspects of the evidence and the testimony that support his findings. Fillmore City v. Reeve (Utah), 571 P.2d 1316 (1977). Consequently, the facts should be viewed in the light most favorable to the ruling of the trial court,

and the findings and judgment should not be disturbed when they are based on substantial, competent, and admissible evidence. Fisher v. Taylor (Utah), 572 P.2d 393 (1977). Appellant says respondent stopped rapidly, and the police officer so indicated in his report. However, the police officer also testified that he didn't know which party his information came from. On the other hand, Dale Wanner, appellant, and respondent testified that the forward vehicle slowed down and then came to a stop, and respondent further testified that he applied his brakes and stopped after the second honk because he thought something might be wrong with his vehicle or that the appellant was trying to stop him. In Finding No. 4, the court concluded as a matter of fact "that plaintiff's stop was not sudden or panicky in the sense that the wheels locked or the type of stop that would put the defendant in jeopardy had defendant not been negligent."

Appellant testified that respondent was going extremely slow, and when asked why he didn't pass to the left of respondent's vehicle he stated there were parked cars on the roadway that prevented such a move. However, this testimony from appellant came at the end of the

trial after he had been educated throughout the trial as to the significance of cars parked on the street, because as the first witness in the trial he testified that he had no recollection of cars being parked on the street in the vicinity of the collision. Appellant's son specifically recalled that there were no oncoming cars, and the investigating officer testified that there were no cars parked on the right or westbound side of the street. Furthermore, appellant's wife testified that immediately after the collision occurred she passed to the left of the vehicles involved in the collision and even came to a stop and adjacent to those vehicles. As set forth in Finding No. 2, the court was justified in believing that "there were no other cars in the immediate vicinity of the collision, either eastbound or parked on the street".

Though appellant placed respondent's speed at 5 to 10 m.p.h., his wife estimated the speed to be higher, and respondent estimated his speed to be 15 to 20 m.p.h. The court was fully justified in determining in Finding No. 3 that respondent's vehicle attained a speed of approximately 15 m.p.h. prior to the first honk by appellant. A fair inference to be drawn is that appellant's speed

was in excess of 15 m.p.h. as it approached the rear of respondent's vehicle and honked the first time, and when appellant observed that instead of speeding up, the respondent slowed down, he had a duty to adjust the speed and distance of his car accordingly. But he did not do so. Instead, he continued his speed and approached even closer to the rear of respondent's vehicle, and then honked again, and respondent then stopped. If in fact there were no parked cars and no oncoming vehicles as found by the court, why didn't the appellant simply pass as his wife did immediately after the impact?

POINT II

RESPONDENT'S DRIVING, PRIOR TO IMPACT, WAS CONSISTENT WITH THE TRAFFIC RULES AND REGULATIONS OF TITLE 41, CHAPTER 6, UTAH CODE ANNOTATED.

All of the witnesses, including appellant, agree that respondent slowed down before he stopped his vehicle, and the investigating officer estimated respondent's vehicle came to a stop approximately 24 inches from the north curb. 41-6-55(b), U.C.A. 1953, as amended, provides:

> Except when overtaking and passing on the right is permitted, the driver of an over-

> taken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

Appellant admits that he was the overtaking vehicle, and his wife's testimony shows there was ample room to pass on the left of respondent, and there were no oncoming vehicles, according to appellant's son. Upon the first sound of the horn, respondent was fully justified in assuming the vehicle approaching from the rear would pass, because his vehicle was over toward the right side of the westbound lane of traffic, and he did not increase his speed but rather decreased it as an accomodation to the car approaching from the rear. At the second sound of appellant's horn, respondent brought his vehicle to a stop. On the other hand, it was the duty of the appellant to comply with the provisions of 41-6-62(a), U.C.A. 1953 as follows:

> The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

It was obvious to the appellant after the first honk that respondent was slowing down, and he had a duty to adjust the speed and distance of his vehicle

accordingly, but instead he simply proceeded closer to the rear of respondent's vehicle and honked again. When appellant failed to pass after the first honk, respondent checked his rear view mirror, found out who it was honking at him, and became justly apprehensive and brought his vehicle to a stop. In his brief appellant admits that tail lights actuated by the brake pedal may be considered an adequate signal, as provided at 41-6-70, U.C.A. 1953. The fact that respondent's vehicle slowed down after the first honk as admitted by appellant is some evidence that an appropriate signal was given before the forward vehicle was brought to a stop, and appellant observed that fact in sufficient time to make the adjustments that would have avoided the collision, and such is his burden and duty. Kight v. Butscher, 90 N.M. 386, 564 P.2d 189 (1977); Apato v. BeMac Transport Co., 7 Ill.App.3d 1099, 288 N.E.2d 683 (1972).

But even if, contrary to the finding of the trial court, there was a sudden decrease in the speed of respondent's vehicle without any brake lights or signal of any kind and a decrease is actually observed by the appellant (as in this case), he has the same notice that

any signal would have imparted if given, and therefore the failure of the respondent to give such a signal is not a proximate cause of the collision. Hallett v. Stone, 216 Kan. 568, 534 P.2d 232 (1975).

Therefore, the admissions of the appellant constitute the strongest kind of evidence against him. Whether he perceived the decrease in speed by brake lights, by a closing of the space between the vehicles, or by some other means is unimportant. The fact that he did perceive it is extremely important, because a signal from the respondent would have given him no better notice than he already had from his own observation, and appellant connects the slowing of the speed to the honk he himself gave. In speaking to this exact point, the court said in Curtiss v. Fahle, 157 Kan. 226, 139 P.2d 827:

> Where the sudden decrease in the speed of a vehicle is actually observed without a signal, the party observing the decrease in speed has the same notice a signal would have imparted if given at that time, and the absence of a signal cannot be said to have been the proximate cause of the collision.

It is the general law of the road that a driver approaching from the rear has a duty to keep a safe lookout to avoid colliding with the vehicle ahead, and

he must take into account the prospects of having to stop his car suddenly. Glen v. Mosley, 39 Ill.App.3d 172, 350 N.E.2d 219 (1976); Kight v. Butscher, supra. Recognition of this general rule was given by the Utah Supreme Court in Bullock v. Ungricht (Utah), 538 P.2d 190, 191 (1975):

> In preface to our analysis of the plaintiff's contentions, we acknowledge our agreement that in most cases where one car "rear ends" another it accords with common sense and experience to believe that the following car has disregarded the duty to keep a lookout ahead and keep the car under control and is, therefore, at fault.

CONCLUSION

Where the evidence is in conflict on any issue, the trier of fact is the final arbiter. Appellant has the burden of proving that there was a sudden stop or decrease in speed, and failed to convince the trial court of that fact. Therefore, the requirements of 41-6-69(c), U.C.A., do not apply. But even if a signal was required, a signal was given, and appellant acknowledges that he received the signal because he testified that the forward vehicle slowed down after appellant's first honk. Being conscious that the vehicle in front was slowing, appellant's awareness of that fact would not have been enhanced by

any additional or other kind of signal given by respondent. Appellant had a golden opportunity to pass respondent's vehicle, but instead appellant consciously chose to honk his horn to encourage respondent to increase his speed. But respondent, not knowing that appellant was not going to pass, reacted oppositely by staying at the extreme right edge of the roadway and slowing his speed, and then finally determined that he would stop after the second honk. After the first honk, surely appellant must have known that respondent may interpret a second honk as a requirement to pull over and stop. The respondent had a right to be uncertain and confused, and to bring his vehicle to a normal stop without further notice to the appellant.

The judgment of the lower court should be sustained and the appeal dismissed.

Respectfully submitted this 5 day of March, 1978.

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CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of March, 1978, I mailed a true and correct copy of the foregoing Respondent's Brief to Brian R. Florence, Attorney at Law, 818 - 26th Street, Ogden, Utah 84401, postage prepaid.

Janice E. Stark